



Oregon

John A. Kitzhaber, M.D., Governor

Department of Land Conservation and Development

635 Capitol Street NE, Suite 150

Salem, Oregon 97301-2540

Phone: (503) 373-0050

Fax: (503) 378-5518

www.oregon.gov/LCD



November 7, 2014

TO: Land Conservation and Development Commission

FROM: Jim Rue, Director
Rob Hallyburton, Community Service Division Manager

SUBJECT: **Agenda Item 8, November 13-14, 2014, LCDC Meeting**

METRO URBAN AND RURAL RESERVES REMAND RESPONSE

AGENDA ITEM SUMMARY

The Land Conservation and Development Commission (LCDC and/or commission) approved urban and rural reserves submitted by Clackamas, Multnomah, and Washington counties and the Metropolitan Service District (“Metro”) in August 2012. The approval was appealed to the Oregon Court of Appeals, which remanded the decision. The remand requires the commission to:

1. Remand Washington County’s reserves designation as a whole for reconsideration and remand the submittal to Metro and the counties so that they can ultimately assess whether any new joint designation, in its entirety, satisfies the best achieves standard.
2. Determine the effect of Multnomah County’s deficient consideration and explanation of why it designated all of Area 9D as rural reserves, and determine whether such error effects the designations of reserves in Multnomah County in its entirety.
3. Meaningfully explain why the designation of Stafford as urban reserves is supported by substantial evidence.

The Oregon Legislature enacted House Bill (HB) 4078 in 2014. This bill, among other things, established reserves in Washington County. This legislation removed the need for the commission to address the first remand item above. The bill also provided one-time authority to the commission that alters its standard of review.

The commission asked parties to the appeal to submit briefs to help guide its response to the remand. This report explains and discusses the various positions related to these remand items and other arguments raised in the briefs. The department is unable to reach a final recommendation on how to proceed because it finds the commission must establish an interpretation of its authority under HB 4078, which will inform the outcome of individual remand items.

The Department of Land Conservation & Development (DLCD and/or department) recommends that the commission accept oral argument at its November 13, 2014 meeting, deliberate on the merits of the various arguments, and provide direction to the department on how to move forward.

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I. AGENDA ITEM SUMMARY

A. Type of Action and Commission Role

The commission reviewed a joint submittal by Metro and Clackamas, Multnomah and Washington counties designating urban and rural reserves; found that it complied with relevant goals, rules, and statutes; and approved it ([Order 12-ACK-001819](#), August 14, 2012). That approval was appealed by several parties to the Oregon Court of Appeals. The court remanded the decision on several grounds. *Barkers Five, LLC v. LCDC*, 261 Or App 259 (2014); *see* Section II.A, “Court of Appeals Decision,” for a description of the remand.

The commission must respond to the remand. The commission has several options, including (1) remand of the matters to the local governments; (2) approval of the submittal upon finding that the record contains an adequate factual base for the commission to conclude the evidence clearly supports the local governments’ decisions; and (3) some combination of (1) and (2). *See* Chapter III, “Review Criteria, Process & Record,” for a complete description of procedural requirements and decision options. Finally, the commission must address whether changes in urban and rural reserves affect an earlier determination that the reserves decision by Metro and the counties “in its entirety, best achieves livable communities, the viability and vitality of the agricultural and forest industries and protection of the important natural landscape features that define the region for its residents.”

B. Staff Recommendation

The department recommends that the commission accept oral argument at its November 13, 2014 meeting, deliberate on the merits of the various arguments, and provide direction to the department on how to move forward.

C. Staff Contact Information

If you have questions about this agenda item, please contact Rob Hallyburton, Community Services Division Manager, at (503) 934-0018, or rob.hallyburton@state.or.us.

II. BACKGROUND

The July 28, 2011 staff report to the commission provides background regarding the purposes of urban and rural reserves, the rules governing their designation, and a summary of local actions. That staff report is available at http://www.oregon.gov/LCD/docs/meetings/lcdc/081711/item_11_murr.pdf.

A. Court of Appeals Decision

The Court of Appeals issued its opinion remanding Order 12-ACK-001819 on February 20, 2014. *Barkers Five*, 261 Or App 259. The court found four errors in LCDC's approval of urban and rural reserves as follows.

[We] conclude that LCDC erred in four respects, including in concluding that it has authority to affirm a local government's decision where its findings are inadequate if the evidence "clearly supports" the decision. Further – and most significantly – LCDC's order is erroneous in the following three respects:

First, LCDC's order is unlawful in substance to the extent that it approved Washington County's legally impermissible application of the rural reserve factors pertaining to agricultural land. Thus, on remand, LCDC must, in turn, remand Washington County's reserves designation as a whole for reconsideration and remand the submittal to Metro and the counties so that they can ultimately assess whether any new joint designation, in its entirety, satisfies the best achieves standard.

Second, LCDC's order is unlawful in substance to the extent that it concluded that Multnomah County's "consideration" of the factors pertaining to the rural reserve designation of Area 9D was legally sufficient. On remand, LCDC must determine the effect of that error on the designations of reserves in Multnomah County in its entirety.

Third, LCDC's order is unlawful in substance because LCDC has failed to demonstrate that it adequately reviewed Stafford's urban reserve designation for substantial evidence. On remand, LCDC should meaningfully explain, why – even in light of the evidence that the RTP indicates that, by 2035, almost all of the transportation facilities serving Stafford will be failing – the designation of Stafford as urban reserves is supported by substantial evidence. *Barkers Five* at 363 (emphasis in original; internal citations omitted).

B. Legislative Action

The 2014 Oregon Legislature enacted [HB 4078](#) (Oregon Laws 2014, Chapter 92), which became effective on April 1, 2014. HB 4078, Sec. 3 establishes urban and rural reserves in Washington County, effectively correcting the errors that the court found LCDC and Washington County had made, and removing the need for the commission to address that point on remand. The bill addressed neither the Clackamas County nor the Multnomah County remand items.

Regarding the court's finding that LCDC does not have the authority to affirm a local government's decision if the evidence "clearly supports" the decision even if its findings are inadequate, HB 4078, Sec. 9 provides:

When the Land Conservation and Development Commission acts on remand of the decision of the Oregon Court of Appeals in Case No. A152351, the commission may approve all or part of the local land use decision if the commission identifies evidence in the record that clearly supports all or part of the decision even though the findings of the local government either:

- (1) Do not recite adequate facts or conclusions of law; or
- (2) Do not adequately identify the legal standards that apply, or the relationship of the legal standards to the facts.

C. Commission Response

The Court of Appeals issued its appellate judgment on July 30, 2014. Under ORS 197.651(12), the commission was required to “respond” to the court’s appellate judgment within 30 days. The commission considered its response to the remand at a special meeting on August 25, 2014. At that meeting, the commission responded by directing the department to issue a scheduling order requesting briefing from the parties on the remand issues, including:

1. Whether there is substantial evidence in the record that clearly supports a conclusion that Multnomah County applied the reserves factors to Area 9D; and
2. Whether there is substantial evidence in the record that clearly supports Metro’s designation of the Stafford area as urban reserves.

The commission also allowed parties to raise other issues. The department issued the [schedule](#) on September 4, 2014. The department received timely opening briefs from nine parties and response briefs from seven parties. All the briefs are available at http://www.oregon.gov/LCD/Pages/metro_urban_and_rural_reserves.aspx. The substance of the issues raised in these briefs is discussed in Chapter IV, “Department Analysis.”

The scheduling order allowed:

Parties may file a response briefs with the department on or before October 9, 2014. A party may file a response brief irrespective of whether or not it filed an opening brief. A reply brief is acceptable if it does not exceed 10 pages; type may not be smaller than 12 point for both the text of the brief and footnotes.

Barkers Five, LLC and Sandy Baker (Barkers¹) initially submitted two response briefs, one replying to Metro’s and Multnomah County’s opening briefs and one replying to Carol Chesarek’s opening brief. The department informed the representative for Barkers that the

¹ Barkers Five, LLC and Sandy Baker were parties in the appeal of the commission’s original decision on urban and rural reserves. As Barkers Five was the first-named appellant, the case is commonly referred to as the *Barkers Five* decision. These same parties are also participants in the current proceedings, having submitted opening and response briefs. In order to avoid confusion, the Court of Appeals decision is herein cited as “*Barkers Five*” and the party to the current proceedings as “Barkers.”

submittals do not conform to the scheduling order's limit of 10 pages. The department provided options of designating one of the briefs as the response briefs or submitting a consolidated brief with additional time to prepare it. Barkers opted for the latter option, and submitted the consolidated brief under protest. Barkers response brief transmittal memo. The consolidated brief was submitted on October 16, 2014.

D. Major Legal and Policy Issues

The commission must address whether and potentially how it chooses to use the authority granted in HB 4078, Sec. 9. This new provision gives the commission *authority*, not a requirement, to consider evidence in a different way than the usual "substantial evidence" determination. This matter is discussed in detail in Section IV.A.

The Court of Appeals remanded the commission's approval of two specific reserve areas: a rural reserve in Multnomah County and urban reserves in Clackamas County. The major legal issues in each relate to the adequacy of findings and of substantial evidence, respectively. These areas are discussed in detail in Sections IV.B and IV.C.

The commission is being asked to consider the effect of any response to the Court of Appeals remand on Metro's determination that the original urban and rural reserves submittal "best achieves livable communities, the viability and vitality of the agricultural and forest industries and protection of the important natural landscape features that define the region for its residents," as called for in the "Purpose and Objectives" of the urban and rural reserves rule. OAR 660-027-0005(2). Parties have also argued that the amendments to reserves in Washington County effected by HB 4078 require a reconsideration of the "best achieves" objective by Metro. The "best achieves" matter is discussed in detail in Section IV.D.

While not an item remanded by the Court of Appeals, a party has argued that the change in the number of urban reserve acres resulting from HB 4078 requires Metro to re-assess whether the requirement in OAR 660-027-0040(2) to provide an adequate amount of land in urban reserves continues to be fulfilled. This matter is discussed on Section IV.E.

III. REVIEW CRITERIA, PROCESS & RECORD

A. Decision-making Criteria

1. Designation of Urban and Rural Reserves

The Court of Appeals remand requires the commission to consider an area in Multnomah County designated rural reserve ("Area 9D") and an area in Clackamas County designated urban reserve (commonly referred to as "Stafford"). [ORS 195.137–195.145](#) provide the statutory criteria for urban and rural reserves in the Metro region. These statutes provide some of the criteria and factors that the commission applies to review the decisions. The statutes address the location of urban reserves and some aspects of rural reserve designations.

In addition to statutory provisions governing the designation of reserves, the legislature directed the commission to adopt rules implementing reserves designation. ORS 195.141(4). The commission adopted [OAR chapter 660, division 27](#), which includes additional considerations for the counties and Metro to employ in their reserve determinations. The relevant rules in this division include provisions regarding the location of urban and rural reserves.

2. Standard of Review

The commission's standard of review is explained in detail in [Order 12-ACK-001819](#) at 19. The findings in Order 12-ACK-001819 asserted that "where local findings are inadequate, the commission nonetheless may affirm the local decision if the local government identifies evidence in the record that 'clearly supports' its decision." Order 12-ACK-001819 at 20. The order goes on to state, "This is analogous to the express statutory authority for the Land Use Board of Appeals (LUBA's) to affirm local land use decisions in these circumstances..." The authority for the Land Use Board of Appeals may make a decision based on evidence that "clearly supports" the local decision is found in ORS 197.835(11)(b).² The Court of Appeals ruled that the commission does not have authority analogous to LUBA's, and HB 4078 granted the authority for the purposes of resolving the remand of Metro urban and rural reserves.

Whether and how the commission uses this authority granted by HB 4078 will play a pivotal role in resolution of the court's remand of urban and rural reserves to the commission. Consequently, the submitted briefs provide a variety of interpretations of the limits of the commission's authority. This issue is addressed in detail in Section IV.A.

B. Procedural Requirements

As provided in OAR 660-027-0080, adopted urban and rural reserves are reviewed "in the manner provided for periodic review under ORS 197.628 to 197.650." The statute and rules do not provide procedures specific to consideration of a Court of Appeals remand.

1. Hearing and Decision

The procedures for the original consideration of the matter are found at OAR 660-025-0085(5)(c), which states that oral argument is allowed from the local governments and those who filed objections. The local governments may provide general information on the task submittal and address those issues raised in the department review and objections. Persons who submitted objections may address only those issues raised in their objections. The commission may take official notice of certain laws, as specified in OAR 660-025-0085(5)(e).

OAR 660-025-0160(7) states that, in response to a referral, the commission must issue an order that does *one or more* of the following:

² "Whenever the findings are defective because of failure to recite adequate facts or legal conclusions or failure to adequately identify the standards or their relation to the facts, but the parties identify relevant evidence in the record which clearly supports the decision or a part of the decision, the board shall affirm the decision or the part of the decision supported by the record and remand the remainder to the local government, with direction indicating appropriate remedial action."

- (a) Approves the [submittal] or a portion of the [submittal];
- (b) Remands the [submittal] to the local government, including a date for resubmittal; [or]
- (c) Requires specific plan or land use regulation revisions to be completed by a specific date. Where specific revisions are required, the order shall specify that no further review is necessary. These changes are final when adopted by the local government. * * *

2. **Ex parte Contact**

A party to the proceedings, Barkers Five, LLC, raised a concern regarding ex parte contact. Ex parte contact concerns communications between parties and decision-makers. There has been no allegation that commission members have communicated with parties in this case. Therefore this issue is not discussed further herein.

C. **The Written Record for This Proceeding**

1. The [entire record](#) of the case as transmitted to the Court of Appeals
2. The Court of Appeals [opinion](#) in *Barkers Five, LLC v. LCDC*
3. The commission's [briefing schedule](#), dated September 4, 2014
4. [Opening briefs](#) from:
 - Barkers Five, LLC and Sandy Baker (hereinafter "Barkers")
 - Clackamas County
 - Carol Chesarek
 - Cities of Tualatin and West Linn (hereinafter "Cities" or "the Cities")
 - Chris Maletis; Tom Maletis; Exit 282A Development Co., LLC; and LFGC, LLC (hereinafter "Maletis")
 - Metro
 - Metropolitan Land Group
 - Multnomah County
 - Springville Investors, LLC, Katherine Blumenkron, and David Blumenkron (hereinafter "Springville")
5. [Response briefs](#) from:
 - Barkers
 - Carol Chesarek
 - Cities
 - Maletis
 - Metro
 - Metropolitan Land Group
 - Multnomah County
6. This staff report

IV. DEPARTMENT ANALYSIS

The commission must determine whether to remand the rural reserve identified as Area 9D in Multnomah County and the Stafford urban reserve in Clackamas County. The commission must either remand these areas for further consideration by the counties and Metro or determine that adequate evidence exists in the record that clearly supports the earlier decision. Finally, the commission must determine whether any changes to the reserves made since the commission's original approval affect the "best achieve" the objective of the reserves and the "amount of land" requirement of statute and administrative rule. Each of these issues is addressed in this section.

A. Commission Authority under HB 4078, Section 9

HB 4078, Sec. 9 provides:

When the Land Conservation and Development Commission acts on remand of the decision of the Oregon Court of Appeals in Case No. A152351, the commission may approve all or part of the local land use decision if the commission identifies evidence in the record that clearly supports all or part of the decision even though the findings of the local government either:

- (1) Do not recite adequate facts or conclusions of law; or
- (2) Do not adequately identify the legal standards that apply, or the relationship of the legal standards to the facts.

This "clearly supports" provision is substantially the same as authority granted to LUBA in ORS 197.835(11)(b) (*see* footnote 2). LUBA has interpreted this authority, establishing its limitations and proper implementation. This section addresses the commission's authority under HB 4078, Sec. 9 generally. The *application* of the "clearly support" provision to individual remand areas is addressed in subsequent sections of this report.

The commission's authority under HB 4078, Sec. 9 is addressed in the following briefs:

- Barkers (opening brief at 15–17)
- Cities (opening brief at 4–6; response brief at 1–3)
- Clackamas County (opening brief at 7–11)
- Metro (opening brief at 2–3)
- Metropolitan Land Group (response brief at 2–3)
- Multnomah County (opening brief at 4–8; response brief at 5–7)

One argument submitted by parties states that LCDC is constrained by earlier interpretations of the "clearly supports" provision, and the commission's authority is therefore the same as LUBA's. Another position contends that the nature of the reserves analysis is different from the cases heard by LUBA, so the law is not as constrained by past interpretations.

All parties seem to agree that the commission's authority to find that evidence in the record "clearly supports all or part of the decision" is different and more constrained than the standard generally employed by the commission: "substantial evidence," which is evidence upon which a reasonable person could rely to reach a decision. Order 12-ACK-001819 and several briefs cite LUBA's decision in *Marcott Holdings, Inc. v. City of Tigard*, 30 Or LUBA 101, 122 (1995), where the board ruled:

We view [the "clearly supports" statute as authorizing] this Board to remedy minor oversights and imperfections in local government land use decisions, as a way to eliminate delays resulting from purely technical objections to a written decision. [The statute does] not permit or require LUBA to perform the responsibilities assigned to local governments, such as the weighing of evidence, the preparation of adequate findings, and the interpretation of comprehensive plans and local land use regulations. (Emphasis in original.)

No party argues that the commission should substitute the local governments' judgment in weighing evidence and interpreting the reserves regulations with its own. From that basis of agreement, positions diverge.

For example, the Cities' opening brief cites a LUBA case where the board found: "Where the relevant evidence in the record is conflicting, or provides a reasonable basis for different conclusions, such evidence does not 'clearly support' the challenged decision." *Waugh v. Coos County*, 26 Or LUBA 308 (1993). The Cities' brief concludes:

[In] order for LCDC to find that the evidence "clearly supports" Metro's and Clackamas County's decision..., it would have to determine that there is no conflicting evidence in the record, that applicable standards are clear and objective and are not subject to policy judgment, and that Metro's decision doesn't involve an error of law. Cities opening brief at 6.

On the other hand, Metro argues in its opening brief that there are *no* "clear and objective" standards that apply to urban reserves so, to give meaning to HB 4078, Sec. 9, it must be interpreted differently than LUBA has for its statutory authority. The brief states:

Local land use decisions on appeal to LUBA require findings addressing whether or not mandatory land use standards and criteria have been satisfied. LUBA is authorized under ORS 197.835(11)(b) to affirm a decision if it can identify evidence that clearly supports a finding that a mandatory approval criterion has been met. In contrast, decisions regarding whether a particular property can be designated as an urban reserve or a rural reserve do not involve the same strict application of mandatory approval criteria. Rather, the reserve rules direct Metro and the counties to make decisions based on the "consideration" of various "factors." Metro opening brief at 4.

For this and other reasons, Metro concludes:

[Some] of the limitations described in LUBA case law regarding application of the “clearly supports” analysis are inherently inapplicable in the context of the highly discretionary “weighing and balancing” associated with choosing an urban or rural reserve designation through the consideration of factors, as compared to findings in support of mandatory approval criteria. For example, LUBA explains that under ORS 197.835(11)(b) it may only affirm a local decision, notwithstanding inadequate findings, “where the evidence in the record makes a finding of compliance with the applicable standard ‘obvious’ or ‘inevitable.’” *Crocker*, 60 Or LUBA at 324. In contrast, LCDC does not review the reserve designations for “compliance” with mandatory standards, and there is virtually no possibility that findings regarding any particular urban or rural designation would be “obvious” or “inevitable” due to the discretionary nature of the reserve factor analysis. Metro opening brief at 5.

3. Analysis of Commission Options

As noted, the commission previously described its understanding of “clearly supports” as “analogous” to the statutory authority of LUBA under ORS 197.835(11)(b). Order 12-ACK-001819 at 20. One approach available to the commission on remand that would certainly be consistent with that statement is to construe HB 4078, section 9 as a legislative enactment intended to provide the commission precisely the authority that it asserted it had in Order 12-ACK-001819. Construing HB 4078, Sec. 9 to provide the commission authority congruent with ORS 197.835(11)(b) as interpreted by case law does, however, in the arguments by the Cities, Clackamas County, and Barkers result in an authority that *requires* a remand. This is because the evidence in the record, at a minimum, provides a reasonable basis for different conclusions.

Such a result renders the HB 4078, Sec. 9 a meaningless legislative act. As described in detail elsewhere in this report, the legislature is presumed to be aware of existing case law construing related statutes and its context within which legislation is passed. *Gaston v. Parsons*, 318 Or 247, 864 P2d 1319 (1994). Under the general rules for construing a statute, the commission is to construe the statute to give effect to all provisions. ORS 174.010. Thus, in applying HB 4078, Sec. 9, Metro contends that the commission should consider a construction of the provision to have some meaningful application in this instance. That is, Metro contends that the nature of the urban and rural reserves analysis make the scope of the authority under HB 4078, Sec. 9 “broader than what is granted to LUBA.” Metro opening brief at 3. Instead, Metro contrasts decisions based on compliance with mandatory approval criteria such as those involved in the case law from the decisions regarding reserves that involve a discretionary “consideration” of factors and balancing factors in making a reserves designation determination.

Multnomah County, joined by Clackamas County, offers an interpretation that falls on the spectrum somewhere between Metro at one end and Barkers and the Cities at the other end. Regarding Area 9D, the court concluded “that, because the county failed to meaningfully explain

why its consideration of the rural reserves factors yields a rural reserve designation of all land in Area 9D, LCDC erred in concluding that the county's 'consideration' of the factors was legally sufficient." *Barkers Five* at 345. The department understands Multnomah County to contend that the intent of HB 4078, Sec. 9 is to obviate the need to follow the Court of Appeals directive for a remand for the county to provide the "meaningful explanation" because the legislature authorized the commission to approve the submittal if the commission identifies evidence in the record that clearly supports the designation of Area 9D even though the Multnomah County findings do not adequately identify the relationship of the legal standards to the facts. That is, in the circumstance where the deficiency identified by the court involves the absence of a meaningful explanation, the commission may excuse that deficiency where the record clearly supports the designation of an area as a particular reserve.

The court expressed a standard of review in instances where a landowner contends that their property was improperly designated as a reserve "solely because of its inclusion within an 'area'": legally sufficient consideration of the factors in making a designation requires that the county "meaningfully explain" why a reserve designation is "appropriate by reference to the totality of the land encompassed within that designation." *Barkers Five* at 305. The court specified:

...to the extent that a property owner challenges the inclusion of his or her property within a designated area, the local government is obligated to have explained why its consideration of the factors yields, as to the totality of the designated land, a result that includes that property. *Barkers Five* at 305-306.

However, that passage must also be read in the context of the court's holding that nothing in the statutes expressly requires the application of the factors to specific properties. Under the construction of HB 4078, Sec. 9 proffered by Multnomah County, the commission could address the court's determination that the submittal does not demonstrate a legally sufficient consideration of the factors if the record nonetheless contains evidence that clearly supports a reserves designation.

4. Staff Recommendation

The department finds that commission is faced with three options for interpreting its authority provided by the legislature in HB 4078, Sec. 9.

1. The commission's authority is defined by existing LUBA interpretations. That is, as argued by the Cities and Barkers, there is no difference between the authority LUBA has interpreted for itself in a series of opinions and the intent of the legislature in enacting HB 4078, Sec. 9. This is the narrowest interpretation and doesn't acknowledge the context of the limited authority provided by the legislation, which applies only to this one case. This is the "safest" alternative insofar as it is the most likely to withstand an appeal; on the other hand, it would necessarily result in a remand of the urban and rural reserves decision.

2. The commission has the ability to define this one-time authority in the context of the urban and rural reserves case to which it applies. It relieves the commission of the need to weigh and balance the evidence as long as there is evidence in the record that supports Metro's and the counties' conclusions. This view is somewhat more expansive than the first option. If the commission agrees with it, as Multnomah and Clackamas counties argue, the commission would have authority to excuse certain deficiencies identified by the court.

3. The commission has considerable authority to make its own conclusions regarding the adequacy of evidence and the reasoning for decisions made by the local governments. This view, espoused by Metro, is the most expansive in terms of the commission's authority to find the current record clearly supports the decisions. It provides the commission the highest level of flexibility in its decision-making, but is the least certain regarding whether it would withstand review at the Court of Appeals.

The department is not currently in a position to recommend which option the commission should employ. Instead, staff recommends the commission accept oral argument at its November 13, 2014 meeting, deliberate on the merits of the various arguments, and provide direction to the department on how to move forward.

The commission's decision on this matter is fundamental to all the decisions that follow. The staff recommendation on each individual remand point discussed hereafter refers to this subsection. Nevertheless, the department will discuss evidence and relevant arguments in order to outline issues and present optional courses of action.

B. Multnomah County Area 9D

The Court of Appeals concluded that the commission erred in concluding that Multnomah County's consideration of the factors pertaining to the rural reserve designation of "Area 9D" was legally sufficient. The court remanded Order 12-ACK-001819 with instructions to the commission to determine the effect of this error.

Area 9D is in western Multnomah County, adjacent to Washington County, between the Metro urban growth boundary on the south and the Multnomah Channel on the north (*see* Figure 1). The area is bisected by Skyline Boulevard, which is not labeled in Figure 1 but is depicted by an "X" where the road crosses the urban growth boundary. (The "X" is not part of the map in the record.)

Issues relating to the remand of the rural reserve designation of Area 9D are addressed in the following briefs:

- Barkers (opening brief at 4–15; response brief at 1–10)
- Chesarek (opening brief at 3–13; response brief at 3–5)
- Metro (opening brief at 17; response brief at 8)
- Metropolitan Land Group (opening brief at 4–8; response brief at 4–6)

- Multnomah County (opening brief at 10–20; response brief at 3–5)
- Springville (opening brief at 1–3)

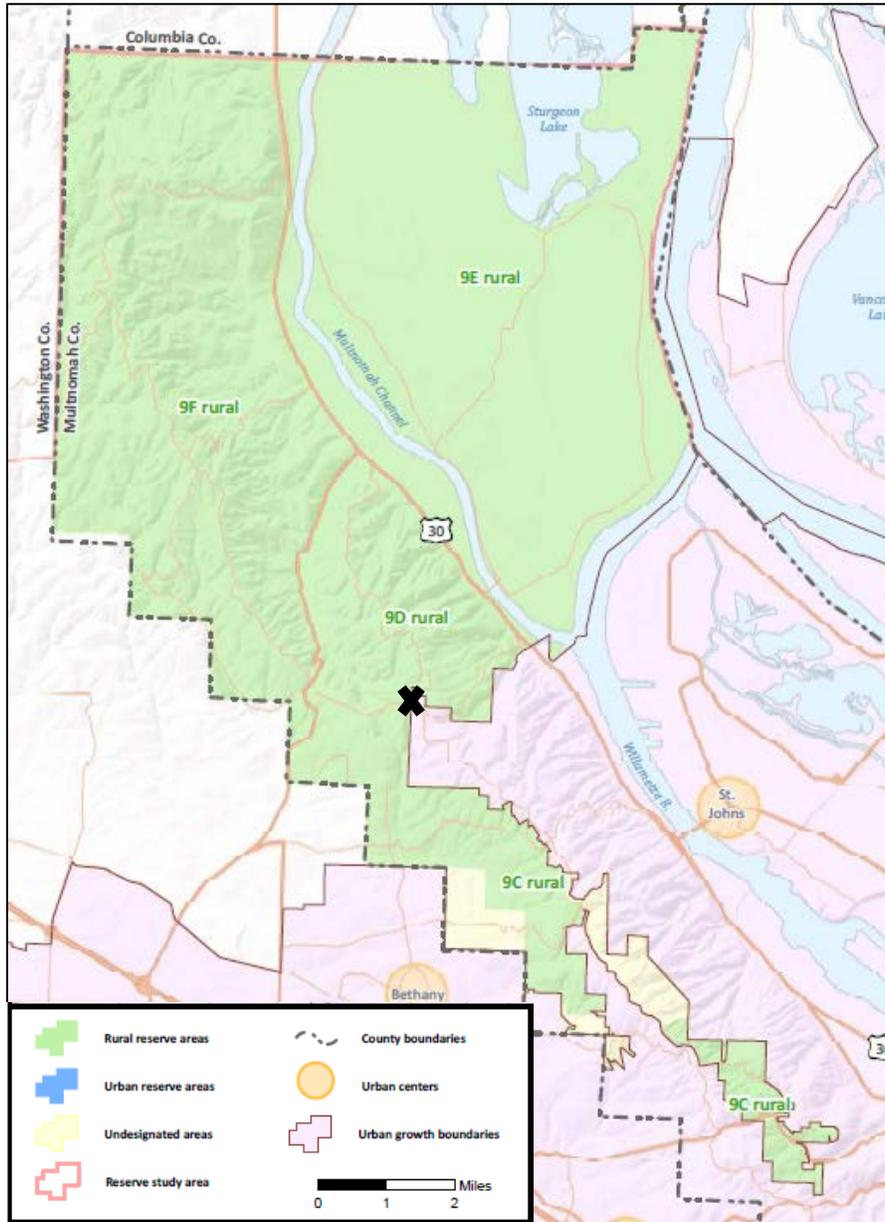


Figure 1. Western Multnomah County Rural Reserves. Scale on legend is inaccurate. Rec. at Att. A, p. 378.

1. Reason for Remand

The court remanded Area 9D because it found that Multnomah County had not adequately explained why it designated the entirety of Area 9D as rural reserve. The record showed that certain characteristics of the land north and south of Skyline Boulevard were different in a

manner that affected the qualification of the two sub-areas for urban and rural reserve designation under applicable factors, and the county largely treated it as one area. The court found that the commission erred in approving the rural reserve designation.

Order 12-ACK-001819 rejected several objections to designation of urban or rural reserves to specific pieces of property, including the Barkers property in Area 9D. The findings addressed the objections collectively rather than making property-by-property findings. The order states:

[The] designation of urban and rural reserves is not intended to be a site-specific, parcel-by-parcel determination. Moreover, as was the case in many instances, in evaluating the factors, Metro and the counties could find that individual areas could be designated as either urban or rural reserve. The statutory process provides the jurisdictions the discretion as to whether or how to designate areas, provided they have fully evaluated the factors. Each of the counties and Metro has made findings with an adequate factual base, based upon substantial evidence in the record explaining how they considered the urban or rural factors with regard to the areas including these properties. Exhibit B to Ordinance No. 11-1255. The issue is whether Metro and the counties considered the urban and rural reserve factors in deciding to designate particular areas, explained why the areas should be urban or rural reserves using the factors listed in the statute and rules, and whether there is evidence in the record as a whole that a reasonable person could rely upon to decide as Metro and the counties did. With regard to each of these remaining individual parcels or areas, the Commission finds that Metro and the counties appropriately considered the factors and made adequate findings based on substantial evidence for each of the areas subject to the objections listed above. Order 12-ACK-001819 at 155.

The court disagreed with the findings and conclusions in the commission's decision and found that the county's findings did not adequately explain its decision with regards to Area 9D. Specifically, the court found:

We conclude that, because the county failed to meaningfully explain why its consideration of the rural reserve factors yields a rural reserve designation of all land in Area 9D, LCDC erred in concluding that the county's "consideration" of the factors was legally sufficient.

First, in the submittal, Metro and the county both referred to the part of the county record in which the Citizen Advisory Committee and county staff applied each of the rural reserve factors to evaluate all of the land in Study Area 6 – which included Barkers' property – and then ranked how the land in that study area fared under each of the factors. The application of the reserve factors to Study Area 6 often yielded different results as to the land in the area that is north of Skyline Boulevard and the land that is south of Skyline – including Barkers' property. Nevertheless, in the description in the submittal as to how Areas 9D (which

encompasses all of Study Area 6) and 9F “fare under the factors,” only a single sentence pertains to the land in Study Area 6 south of Skyline Boulevard: “Landscape features mapping south of Skyline includes both Rock Creek and Abbey Creek headwaters areas that abut the [C]ity of Portland on the east and follow the county line on the west.” Nothing more.

Second, the submittal’s description of why Areas 9D and 9F were designated as rural reserve consists of a single paragraph with broad, unqualified declarations that appear to relate to some of the factors in OAR 660-027-0060(3) pertaining to the designation of rural reserves to protect important natural landscape features. However, it does not meaningfully explain why consideration of the pertinent factors yields a designation of all of the land in Area 9D – including Barkers’ property – as rural reserve. That is so, because, as noted above, the application of the factors to Study Area 6 often yielded different results as to the land in the area that is south of Skyline Boulevard – including Barkers’ property... Under those circumstances, a meaningful explanation as to why Area 9D, in its entirety, was designated as rural reserve would have acknowledged that application of the factors failed to yield similar results as to all of the land in the area but explained, nonetheless, why the entire area should be designated as rural reserve. *Barkers Five* at 345 (footnotes omitted).

In its summary of the case, the court concluded by stating:

...LCDC’s order is unlawful in substance to the extent that it concluded that Multnomah County’s “consideration” of the factors pertaining to the rural reserve designation of Area 9D was legally sufficient. On remand, LCDC must determine the effect of that error on the designations of reserves in Multnomah County in its entirety. *Barkers Five* at 364.

2. Analysis of Commission Options

The department has identified three options available to the commission.

1. The commission may review the record and, using the authority granted in HB 4078, Sec. 9, determine that materials already contained in the reserves submittal includes evidence that clearly supports Multnomah County’s designation of Area 9D as rural reserve.
2. The commission may determine that materials already contained in the reserves submittal does not include evidence that clearly supports Multnomah County’s designation of Area 9D as rural reserve or that the authority under HB 4078, Sec. 9 is not broad enough to provide the commission the opportunity overlook the need for Multnomah County to meaningfully explain why it designated all of the land in Area 9D as it did. In either case, this would result in a remand to Multnomah County.

3. Unrelated to the commission's authority under HB 4078, Sec. 9, one party advances a position that the commission has the authority to determine that the county incorrectly applied the rural reserves factors and order the county to remove the designation from a single ownership, leaving it undesignated.

Evidence that clearly supports a conclusion. To determine whether the authority granted in HB 4078, Sec. 9 can and should be used, the commission needs to consider several questions:

- How broadly can the commission use its authority under HB 4078, Sec. 9?
 - What aspect of the decision is the commission reviewing?
 - Does the record contain evidence that clearly supports the designation?
- *Regarding how broadly the commission uses its authority under HB 4078, Sec. 9, see Section IV.A for an explanation of the constraints on the commission's authority. This is a fundamental determination that affects the outcome of Area 9D and other parts of the remand.*
- *Regarding which aspect of the decision the commission is reviewing, the remand decision states that Multnomah County failed to explain why it designated all of Area 9D rural reserve. Multnomah County argues that it is not the decision to *designate the land rural reserve* that the commission must consider, but rather whether the record clearly supports that the land is *suitable* for a rural reserve designation under the factors in [OAR 660-027-0060](#). The county states:*

LCDC's new authority allows LCDC to overlook the county's error and affirm the rural reserve designation of Area 9D if the county cites evidence in the record that is sufficiently compelling to allow LCDC to affirm the county's designation. More specifically, under LCDC's new authority, LCDC may affirm the rural reserve designation of Area 9D if LCDC finds that it is "obvious" from the record evidence that both the northern and southern halves of Area 9D *are suitable for rural reserve designation*. Multnomah County opening brief at 8 (emphasis added).

The county further explains this stance as follows:

The better approach is to understand that the legislature intended HB 4078(9) as a useful tool, meaning that the legislature recognizes the difference between the *criteria* at issue in the LUBA decisions and the *factors* at issue here and that the legislature understands that the analysis of *factors* frequently culminates in a record that supports more than one conclusion.

Accordingly, the question before LCDC is not, as Barkers suggest, whether the record clearly supports only the designation selected by the local government. Such interpretation would render HB 4078(9) meaningless.

Instead, to give meaning to HB 4078(9), the question before LCDC is whether the record evidence “clearly” and “obviously” demonstrates that the designation selected by the local government for an area *is one of* the lawful choices available for that area. Multnomah County response brief at 7 (emphasis in original).

The designation of reserves is discretionary and the sole purview of the county. Multnomah County posits that the commission could satisfy the remand by finding evidence in the record that clearly supports the county’s finding that the southern part of Area 9D has the characteristics that would make it a candidate rural reserve.

The county points to evidence in the record it contends acknowledges the dissimilarities between the areas north and south of Skyline Boulevard and clearly supports the county’s determination that both halves of Area 9D are suitable for rural reserve designation. Multnomah County opening brief at 10. The county points out evidence in the record that both areas are suitable for rural reserve designation under the factors.

Other parties disagree. Anticipating Multnomah County’s argument, Barkers argues as follows:

The evidence in the record does not “clearly support” the conclusions that Multnomah County either lawfully considered the reserves factors or lawfully concluded that the yield of a lawful analysis of the reserves factors means that, on balance, the purposes of the reserves rules are best achieved by designating Area 9D and petitioners’ property, rural reserve. Rather the evidence is at best conflicting and conflicting evidence is not evidence that “clearly supports” a decision. Finally, the evidence in the record cannot as a matter of law “clearly support” the Multnomah County / Metro “decision” the court of appeals remanded, because Metro and Multnomah County’s performance of the required analysis necessarily must consider the effect of HB 4078 on how area 9D, including petitioners’ property, “fares” under the factors. HB 4078 significantly changed the regional balance of urban and rural reserves. Barkers opening brief at 3.

Another party agreed with Barkers in principle.

LCDC’s authority to review evidence is limited to the local record. ORS 197.633(3). Accordingly, LCDC cannot generally accept new evidence in the first instance. In the present case, resolution of the Multnomah County remand issue will require consideration of new evidence. Therefore, LCDC must remand the submittal. Metropolitan Land Group opening brief at 6.

In response to Multnomah County’s brief, Barkers argued:

The county misunderstands the remand and LCDC’s scope of review. The county

seeks to have LCDC designate Petitioners' property as rural reserve based on LCDC's view of the outcome of the required reserves factors analysis, performed as the court held the county was required to do, but did not. HB 4078 does not permit LCDC to weigh and balance the reserves factors. It does not permit LCDC to decide the yield of the reserves factors... The purpose of the analysis is to enable the *county* to decide whether a proper analysis yields that all of the land in Area 9D...should be designated rural reserve. Under the "evidence clearly supports" standard of review, the questions are whether the evidence clearly supports the required analysis occurred and, after the required analysis, whether the [Area 9D] property must be designated rural reserve. Both the analysis and decision are inherently discretionary exercises reserved to the local governing body. Thus, nothing permits LCDC to undertake the discretionary legal analysis and make the ultimate decision on remand, based on LCDC's judgment of the analytical results. Barkers response brief at 1 (emphasis in original).

Metropolitan Land Group, in its response brief, argued:

Although [HB] 4078, Section 9 authorizes LCDC to, in theory, approve all or part of the reserves decision on remand if LCDC identifies evidence in the record that "clearly supports" the decision even if the findings in support of that decision are deficient, LCDC should find that, under the circumstances, it lacks the authority to find that evidence "clearly supports" the designation of Area 9D as a rural reserve.

* * *

Conflicting evidence exists in the present case. *See* Barkers Five, LLC LCDC Remand Brief at 6-15. Therefore, LCDC cannot find that there is evidence that "clearly supports" the designation of Area 9D as a rural reserve, and LCDC should remand this issue to Multnomah County and Metro.

These parties raise issues related to the commission's scope of review and its authority to use discretion in resolving the remand. See Section IV.A regarding the commission's authority to find that evidence clearly supports a decision under HB 4078, Sec. 9. Under a narrow interpretation of the commission's authority under Sec. 9, the county still needs to provide a meaningful explanation of why it designated all of Area 9D rural reserve. A broad interpretation of the authority provides the commission an opportunity to find that it has the authority to overlook the inadequate explanation and find the record supports the designation.

- *Regarding whether the record contains evidence that clearly supports the designation*, Multnomah County points out that the existing record recognizes the dissimilarities between the northern and southern portions of Area 9D.

Dissimilarities exist between the northern and southern halves of Areas 9D. The northern half of Area 9D is “primarily forested,” has been mapped by the Oregon Department of Agriculture as containing “wildland forest” and “mixed forest,” “consists of a large block of forest land with few non forest [*sic*] uses,” and contains “high-value habitat, access to recreation, and other values that define the area as a landscape feature important to the region.” Rec at 2993, 2995, 2997. This northern half is subject to little risk of urbanization. *Id.* at 2993, 2995.

In contrast, the southern half of Area 9D is “primarily farm area,” has been mapped by the Oregon Department of Agriculture as containing “important” farmland, has certain farming limitations but “good integrity” overall, has “few non-farm uses” and edges compatible to farming, and contains the “stream features of Abbey Creek mainstream, north fork, and headwaters areas that are mapped as important regional resources and that separate urban from rural lands.” Rec at 2993, 2995, 2997. This southern half is subject to a risk of urbanization. *Id.* at 2994, 2995.

Both areas “rank high for sense of place” and, like the northern land, the southern land encompasses some important upland habitat areas, albeit of lesser regional value overall than the habitat present in the northern half of this Area. *Id.* at 2997. Multnomah County opening brief at 11.

Regarding whether the record is sufficient for the commission to find that it clearly supports the ultimate decision, the county’s explanation of the evidence is too lengthy to quote here. It is available on pp. 12–18 of the [county’s opening brief](#). In summary, the county points to evidence where the county found that:

- “Except for a few instances noted below, application of the farm and forest protection factors in OAR 660-027-0060(2) to Area 9D yielded a conclusion that this area ranks ‘high’ for rural reserve designation with respect to both the northern and southern halves of the area.” Multnomah County opening brief at 13.
- “Where Area 9D did not receive a ‘high’ ranking, it received, with one exception noted below, a ‘medium’ ranking.” Multnomah County opening brief at 14.
- “[W]hereas the northern half of Area 9D is not subject to a risk of urbanization, and therefore received a ‘low’ ranking for that factor, the southern half ranked ‘high’ for this factor, meaning it ranked ‘high’ for protection through rural reserve designation.” Multnomah County opening brief at 14.
- “As with the farm and forest factors above, and except for a few instances noted below, application of the landscape feature factors in OAR 660-027-0060(3) to Area 9D yielded a rural reserve designation for *each* half of Area 9D and, thereby, *all of the land* in Area 9D.” Multnomah County opening brief at 15.

- “Both halves ranked ‘high’ for rural reserve as providing a sense of place and easy access to recreational opportunities.” Multnomah County opening brief at 16.
- “With respect to important fish, plant and wildlife habitat, both halves ranked ‘high’ for rural reserve protection, with the exception that that the Kaiser Road and east-of-abbey creek areas ranked ‘medium’...” Multnomah County opening brief at 16.
- “Area 9D did receive some ‘low’ rankings, but not with respect to qualities that dissuaded the CAC, staff or the county from designating this area as rural reserve.” Multnomah County opening brief at 16.
- “Based on the foregoing analysis, and as explained in the following summary and conclusion, the county found that its consideration and application of the landscape feature factors to Area 9D yielded a rural reserve designation for *each* half of Area 9D and, thereby, *all of the land* in Area 9D...” Multnomah County opening brief at 17.

All of this evidence, taken together, leads the department to believe that it would be reasonable for the commission to conclude that the evidence in the record supports the finding that all of Area 9D is suitable for a rural reserve designation. Whether the commission uses this evidence to conclude the record “clearly supports” the decision depends on its interpretation of its authority under HB 4078, Sec. 9. See Section IV.A of this report.

Remand Area 9D. Should the commission find that the evidence in the record clearly supports Multnomah County’s decision to designate Area 9B as rural reserve and that Barkers’ proposed specific plan revision does not satisfy the Court of Appeals remand, the option is to remand the matter to Multnomah County and Metro for reconsideration as instructed by the court. The remand would instruct the county to meaningfully explain why its consideration of rural reserves factors yields a rural reserve designation for all of Area 9D and determine the effect of that error on the designations of reserves in the county in its entirety.

Reversal of rural reserve designation. Barkers, in its opening brief, lays out a proposed option that it contends would satisfy the remand.

LCDC, on the other hand, has independent authority to respond to the court of appeals remand determining Multnomah County incorrectly applied the reserves factors by including the Barkers property in Area 9D rural reserves. LCDC can and must acknowledge the court directed it to consider the effect of the errors the court identified on the Multnomah County reserves “in their entirety.” LCDC can decide the effect of this error undermines and delays Multnomah County reserves in their entirety. From here, per OAR 660-025-0160(7)(c),³ LCDC can resolve the

³ OAR 660-025-00160(7) provides: “Following its hearing, the commission must issue an order that does one or more of the following:

“(a) Approves the work task or a portion of the task;

court's remand by ordering Multnomah County to remove the Barkers property from the Area 9D rural reserves and leave the Barker property undesignated. LCDC has authority to take this action because (1) the court charged LCDC to decide the effect of the identified errors on the Multnomah County reserves in their entirety, (2) the determination to respond by removing the Barker property and leaving it undesignated is not reserved by rule or statute to the county or Metro, and (3) OAR 660-025-0160(7)(c) gives LCDC authority to make such an order because it does not tread on authority reserved to others.

Thus, while only the county and Metro have statutory and rule authority to designate urban and rural reserves, ordering that property be left undesignated because the court of appeals determined a rural reserves designation is unlawful, is not reserved to the county or Metro. (Footnote added.) Barkers opening brief at 5.

The urban and rural reserves submittal was reviewed in the manner provided for review of a periodic review work task. OAR 660-025-0175(1)(c) and (f). The administrative rules guiding periodic review processes in OAR chapter 660, division 25 therefore apply. Barkers suggests that the commission's authority to require specific revisions to plans or land use regulations could be employed to require Multnomah County "un-designate" its property.

Multnomah County countered: "...Barkers continue to mistakenly frame this case in terms of their own property. This case is not about the Barkers' property, it is about the designation of Area 9D." Multnomah County response brief at 3. The department agrees with the county. The decision said: "To be clear, as explained above, the county was not required to justify the designation of *Barkers' property*." *Barkers Five* at 346 (emphasis in original).

This option is not responsive to the remand. The court ordered the commission to resolve the county's inadequate explanation of why it designated all of Area 9D as rural reserve. Simply removing the Barkers property from the rural reserve does not remedy the identified error.

3. Effect of Remand on Designations in Multnomah County in its Entirety

Parties contend that the commission must remand the entirety of Multnomah County reserves as a result of the Court of Appeals' remand because the court's opinion states: "On remand, LCDC must determine the effect of that error on the designations of reserves in Multnomah County in its entirety." Metropolitan Land Group frames the issue thusly:

"(b) Remands the work task or a portion of the task to the local government, including a date for resubmittal;

"(c) Requires specific plan or land use regulation revisions to be completed by a specific date. Where specific revisions are required, the order shall specify that no further review is necessary. These changes are final when adopted by the local government. The failure to adopt the required revisions by the date established in the order shall constitute failure to complete a work task by the specified deadline requiring the director to initiate a hearing before the commission according to the procedures in OAR 660-025-0170(3);

"(d) Amends the work program to add a task authorized under OAR 660-025-0170(1)(b); or

"(e) Modifies the schedule for the approved work program in order to accommodate additional work on a remanded work task."

In the present case, resolution of the Multnomah County remand issue may require modifying or applying reserves designations. As explained above, the Court ordered a remand to address how the error committed by Multnomah County/LCDC affected “the designations of reserves in Multnomah County in its entirety.” *Barkers Five, LLC*, 261 Or App at 347. Thus, resolution of this issue will require consideration of, and possible changes to, reserve designations across Multnomah County. Metropolitan Land Group opening brief at 7.

Springville asserts an even more far-reaching effect of the remand.

This Opinion held the LCDC decision unlawful regarding the rural reserve designation of area 9D and ordered “on remand, LCDC must determine the effect of that error on the designations of reserves in Multnomah County in its entirety.” The word “designations” is plural. Petitioners submit the Opinion remand requires LCDC to immediately vacate all designations of rural reserve in Multnomah County.

Petitioners submit that to properly consider the “effect of that error” LCDC must consider the factors used to determine the designation of Area 9D, and determine if such factors affected or were affected by other study areas.... Springville opening brief at 1.

The court did not explain its reasoning for requiring consideration “the effect...in Multnomah County in its entirety” within the context of the deficiencies in the county’s explanation of its Area 9D rural reserve designation. The court explained its conclusions in consideration of the “best achieves” standard:

Reduced to its fundamental core, LCDC’s reasoning appears to be predicated on its understanding that “best achieves” is a standard that ultimately allows for a range of permissible joint designations. As we understand LCDC’s reasoning, Metro and the counties’ discretion is not unbridled but, consistently with the statutory and regulatory scheme, is guided by their consideration of the urban and rural reserve factors and the need for “a balance in the designation of urban and rural reserves that, in its entirety, best achieves livable communities, the viability and vitality of the agricultural and forest industries and protection of the important natural landscape features that define the region for its residents.” OAR 660-027-0005(2). Thus, LCDC’s interpretation of the best achieves standard to require Metro and the counties to demonstrate that the standard has been satisfied – that is, that the joint designation in its entirety falls within the range of permissible designations – through their findings concerning the application of the reserve factors is plausible and not inconsistent the statutory or regulatory schemes. Further, that interpretation is consistent with the plain text of OAR 660-027-0040(10), which requires that Metro and the counties’ findings concerning the application of the reserve factors must explain not only “why areas were chosen

as urban or rural reserves” but also “how these designations achieve the objective stated in OAR 660-027-0005(2).” Accordingly, because LCDC’s interpretation of its rules is plausible and not inconsistent with their text or context or with the governing statutes, we, once again, defer to it. *Barkers Five* at 318.

Multnomah County’s inadequate explanation of why it designated all of Area 9D rural reserve *may* require reconsideration of the “best achieves” standard.⁴ However, the court also recognizes that the standard “ultimately allows for a range of permissible joint designations.”

Specifically, if the commission chooses to remand Area 9D to Multnomah County, the county will first need to determine whether it can meaningfully explain why it designated all of the land in Area 9D as rural reserve. If, the county undertakes that task and does not make a change to a reserve designation (which the department considers likely), then there will presumably be no effect on the designation of reserves in the region.

Even if the county decides it needs to amend a reserve designation, the effect cannot be presumed to upset the “best achieves” balance because a range of permissible designations is possible and the acreage known to be affected is a small proportion of the rural reserves in the region. Rather, this change would need to be evaluated to determine if it had an effect on the “best achieves” objective; only if such affirmative determination was made would the county be required to address the designation of other areas.

Finally, contrary to the argument offered by Springville, neither the Court of Appeals’ remand nor a commission remand would require Multnomah County to consider designations county-wide. Nothing in the court’s decision supports the notion that all rural reserves in the county must be vacated.

5. Staff Recommendation

As mentioned above, the department has stopped short of concluding its analysis pending direction from the commission on an interpretation of the commission’s authority under HB 4078, Sec. 9. If the commission believes it has relatively narrow authority under the law to find that existing evidence clearly supports Multnomah County’s decision to designate Area 9D as rural reserve, the likely result will be a remand as the Court of Appeals instructed. If the commission finds it has a broader ability to use existing evidence, the department finds that such evidence does exist in the record, so non-remand alternatives exist.

C. Stafford Urban Reserves

“Stafford” is a collective term for four adjacent urban reserve areas approved by Metro in Clackamas County and upheld by the commission in Order 12-ACK-001819. The four areas were referred to by Metro as Area 4A (Stafford), 4B (Rosemont), 4C (Borland), and 4D

⁴ “The objective of this division is a balance in the designation of urban and rural reserves that, in its entirety, best achieves livable communities, the viability and vitality of the agricultural and forest industries and protection of the important natural landscape features that define the region for its residents.” OAR 660-027-0005(2).

(Norwood). The urban reserves are in western Clackamas County, straddling I-205, and adjacent to Washington County, Tualatin, Lake Oswego, and West Linn (*see* Figure 2). The Court of Appeals found that Metro and Clackamas County failed to provide substantial evidence that Stafford can be provided with an adequate urban transportation system, and that the commission's approval order does not demonstrate an adequate review for substantial evidence.

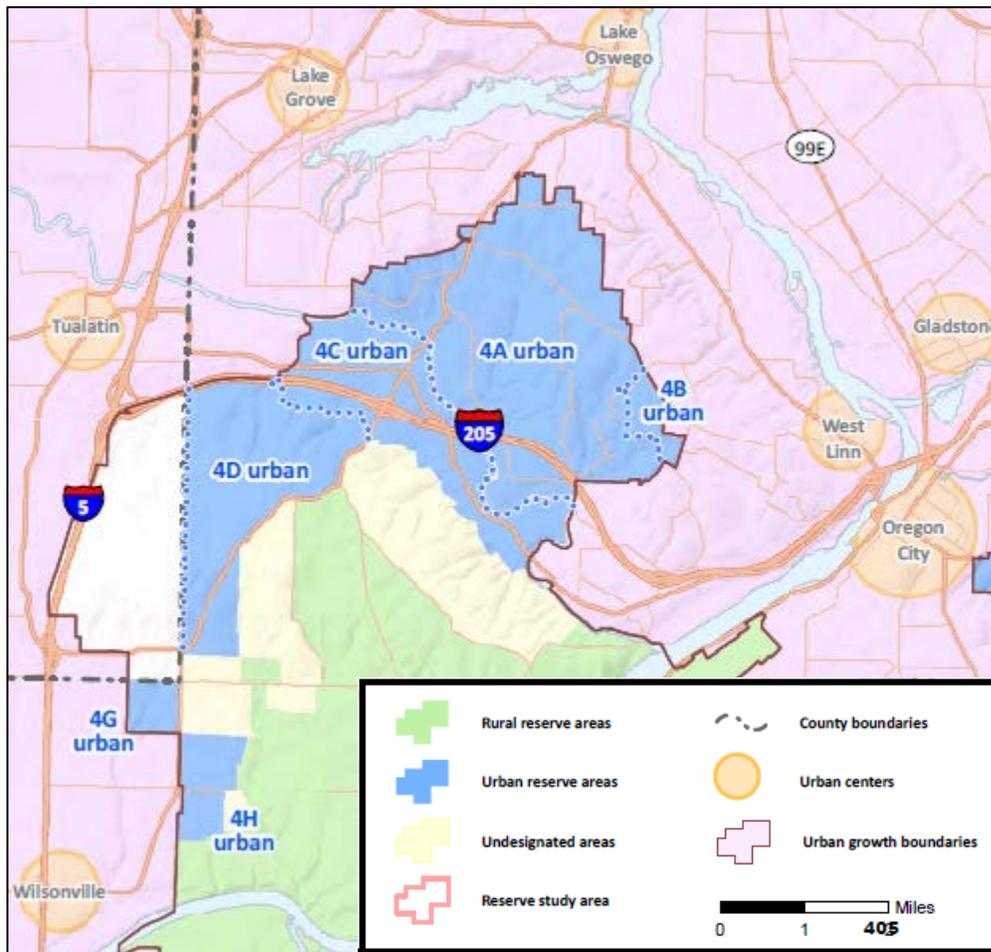


Figure 2. Stafford-area Urban Reserves. Scale on legend is inaccurate. Rec. at Att. A, p. 405.

Issues relating to the remand of the urban reserve designation of Stafford are addressed in the following briefs:

- Cities (opening brief at 6–11; response brief at 3–9)
- Clackamas County (opening brief at 4–7; 12–14)
- Maletis (response brief at 8–10)
- Metro (opening brief at 6–15; response brief at 2–6)

1. Reason for Remand

The City of West Linn presented evidence to the Court of Appeals that the transportation system in Stafford is projected to fail before 2035, and argued that this is evidence the area is unsuitable for urbanization. Metro and Order 12-ACK-001819 provided an explanation for why the area was designated urban reserve in spite of the transportation system inadequacy, but the court found the reasoning to be speculative and not responsive to the countervailing evidence. The court remanded the urban reserve designation for the commission to demonstrate that it adequately reviewed Stafford's urban reserve designation for substantial evidence.

The opinion states:

...we conclude that LCDC's order is unlawful in substance because the evidence to which West Linn points, indicating that the transportation facilities serving Stafford will be failing by 2035, is "so at odds" with LCDC's determination that the designation of Stafford as urban reserve is supported by substantial evidence that it gives rise to an inference that LCDC misunderstood its standard of review. *Younger*, 305 Or at 359. Thus, it was incumbent on LCDC to provide a "meaningful explanation" as to why – even in light of that conflicting evidence – the designation of Stafford as urban reserve is supported by substantial evidence. LCDC did not do so. *Barkers Five* at 360.

The court further explains its reasoning as follows:

...West Linn pointed to evidence demonstrating that "the RTP indicates that almost all of the transportation system that would provide access to the Stafford Area will be functioning at service level F (for 'failing') by 2035."

* * *

Metro and the county do not take issue with the correctness of the evidence to which West Linn points – *viz.*, that the RTP indicates that, by 2035, almost all of the transportation facilities serving Stafford will be failing. Instead, they reason that the evidence is immaterial because (1) the RTP is only a prediction of traffic flows for a 25-year period; (2) the urban reserves planning period extends to 2060, which is 25 years beyond the time frame addressed in the 2035 RTP; and (3) the transportation system will necessarily change (*e.g.*, a new light rail line in the vicinity of I-205 has been identified as a "next phase" of regional priority). Stated simply, Metro and the county's reasoning reduces to nothing more than the proposition that the transportation system will change – and presumably improve – by 2060. However, Metro and the county do not explain, by reference to the evidence in the record, why that is so. Bluntly: Metro and the county's reasoning – which LCDC essentially adopted in resolving the substantial evidence challenge – is impermissibly speculative.

Although the designation of land as urban reserve must be based on consideration of the factors, which requires, among other things, that the factors are weighed and balanced as a whole – and although Metro and the counties need not demonstrate “compliance” with any factor – the provision of adequate transportation facilities is critical to the development of urban areas. Evidence demonstrating that “the RTP indicates that almost all of the transportation system that would provide access to the Stafford Area will be functioning at service level F (for ‘failing’) by 2035,” is weighty, countervailing evidence that is squarely at odds with LCDC’s determination that the designation of Stafford as urban reserve is supported by substantial evidence. In its order, LCDC acknowledged the evidence to which West Linn points, but, in response, did nothing more than adopt Metro and the county’s speculative reasoning that the transportation system will presumably improve by 2060.

In sum, West Linn has pointed to weighty, countervailing evidence that is squarely at odds with LCDC’s determination that the designation of Stafford as urban reserve is supported by substantial evidence, and LCDC has failed to meaningfully explain why – even in light of that conflicting evidence – Metro and the counties’ designation of Stafford as urban reserve is supported by substantial evidence. See *Younger*, 305 Or App at 360. *Barkers Five* at 361.

The court concluded:

LCDC’s order is unlawful in substance because LCDC has failed to demonstrate that it adequately reviewed Stafford’s urban reserve designation for substantial evidence. On remand, LCDC should meaningfully explain, why – even in light of the evidence that the RTP indicates that, by 2035, almost all of the transportation facilities serving Stafford will be failing – the designation of Stafford as urban reserves is supported by substantial evidence. *Barkers Five* at 364.

2. Analysis of Commission Options

The department has identified two options available to the commission.

1. The commission may review the record and, using the authority granted in HB 4078, Sec. 9, determine that materials already contained in the reserves submittal includes evidence that clearly supports the designation of Areas 4A, 4B, 4C, and 4D as urban reserve.
2. The commission may remand the matter to Metro for adequate consideration of urban reserve Areas 4A, 4B, 4C, and 4D under the reserves factors.

Evidence that clearly supports a conclusion. Clackamas County’s and the Cities’ opening briefs argue that the commission’s authority to find that evidence clearly supports the decision to designate Stafford as urban reserves is too limited, and the evidence in the record too scant, for

the commission to resolve the Court of Appeals remand without sending the matter back to the local governments. Clackamas County opening brief at 12; Cities opening brief at 6.

Metro provided a detailed explanation of its preferred commission response. The description is too long to quote here. See [Metro opening brief](#) at 6–15. To summarize, Metro contends that:

- Traffic forecasts have no relevance to the questions posed by the urban reserve factors, which is whether Stafford could be efficiently and cost-effectively served with transportation facilities within a 50-year horizon.
- The arguments relating to traffic congestion at the Court of Appeals included exaggerated or false information that the court took as fact.
- A recent update to the Metro-area Regional Transportation Plan (RTP) includes information that reveals the older RTP (which the court relied upon as “weighty, countervailing” evidence) is unreliable due to new predictions showing improved traffic conditions in Stafford.
- Although the updated RTP is not in the record, the commission may take official notice of the document.
- Metro now requires concept plans for areas to be included in the UGB, and concept plans must include “detailed planning regarding how transportation services will be provided to the area, including a description of methods for financing those services.”

Metro concludes that the commission should “reject the cities’ argument that the 2035 RTP [in the record] constitutes evidence that transportation services cannot be efficiently and cost-effectively served to Stafford under the urban reserve factors on a 50-year planning horizon” and “[t]his evidence provides the ‘meaningful response’ to the evidence cited by the cities from the 2035 RTP that the court of appeals found was lacking.” Metro opening brief at 11, 14.

Metro argues that the commission has the authority to take remedial action without remanding the matter.

Again, it is important to remember that the court’s remand is specifically directed at LCDC (and not to Metro or the counties) for the purpose of asking LCDC to correct a purely legal (and not evidentiary) deficiency in its order regarding the correct application of the substantial evidence test. The court did not hold that Metro’s decision to designate Stafford as an urban reserve was not supported by substantial evidence in the record. The court held that LCDC incorrectly applied its standard of review for substantial evidence by failing to “meaningfully respond” to conflicting evidence relied upon by the cities in the 2035 RTP. For the reasons described above, LCDC may adopt findings on remand that provide the response the court found lacking on those issues, based on evidence that clearly supports an approval of Metro’s decision. Metro opening brief at 15.

Clackamas County generally argues that the evidence in the record is more extensive than explained by the county and Metro in the original findings and it agrees with Metro that new

transportation information will assist in showing that the urban reserve designation of Stafford was valid. The county nevertheless argues that the local governments, not the commission, must make this determination because the commission's authority under HB 4078, Sec. 9 is too limited to allow it to do so. Clackamas County opening brief at 12.

Other parties disagree with each of Metro's points. Maletis argues that the updated RTP is not in the record and that, even if the commission takes official notice of the updated RTP, it still must confine its review to the record. Maletis response brief at 8. The Cities argue that:

1. The updated RTP is not in the record so it cannot "clearly support" Metro's decision to designate Stafford as urban reserve.
2. Metro has not pointed to any other evidence in the record that clearly supports the decision.
3. The commission could not have taken notice of the updated RTP because it didn't exist at the time the commission conducted its review.
4. The data and information in the updated RTP do not refute earlier testimony that the transportation system in Stafford will fail. Cities response brief at 6–8.

Regarding Metro's contention that the remand applies only to the commission and to correct a legal, not evidentiary, deficiency, the Cities respond:

The Cities agree with Metro that the error committed by LCDC was the failure to correctly apply the substantial evidence test. The Cities disagree that the Court of Appeals did not conclude that Metro's decision was not supported by substantial evidence. That is exactly what the court did. LCDC adopted Metro's finding without further analysis and the court concluded that Metro's finding was so inadequate that it was proof that LCDC misapplied the test. Cities response brief at 5.

Metro has presented a way for the commission to avoid a remand of Stafford to Metro for reconsideration. Whether the commission employs this option depends largely on its interpretation of the authority granted by HB 4078, Sec. 9. *See* Section IV.A.

Remand Stafford urban reserves. Should the commission find that the evidence in the record does clearly support Metro's decision to designate Stafford as urban reserve, the remaining option is to remand the matter to Clackamas County and Metro for reconsideration as instructed by the court. The remand would instruct Metro to meaningfully explain why – even in light of the evidence that the RTP indicates that, by 2035, almost all of the transportation facilities serving Stafford will be failing – the designation of Stafford as urban reserves is supported by substantial evidence.

6. Staff Recommendation

As mentioned above, the department has stopped short of concluding its analysis pending direction from the commission on an interpretation of the commission's authority under

HB 4078, Sec. 9. If the commission believes it has relatively narrow authority under the law to find that existing evidence clearly supports Metro’s decision to designate Stafford as urban reserves, the likely result will be a remand as the Court of Appeals instructed. If the commission finds it has a broader ability to use existing evidence, an approval path has been laid out.

D. “Best Achieves”

The question addressed in this section is whether the commission must remand the urban and rural reserves submittal to Metro and the three counties to address the changes to reserves designations made by the legislature in HB 4078: specifically whether, after the legislative redesignation of reserves in Washington County, the adjusted result satisfies the “best achieves” standard.

The “best achieves” standard is set forth in the “Purpose and Objective” statement of the urban and rural reserves rules:

Urban reserves designated under this division are intended to facilitate long-term planning for urbanization in the Portland metropolitan area and to provide greater certainty to the agricultural and forest industries, to other industries and commerce, to private landowners and to public and private service providers, about the locations of future expansion of the Metro Urban Growth Boundary. Rural reserves under this division are intended to provide long-term protection for large blocks of agricultural land and forest land, and for important natural landscape features that limit urban development or define natural boundaries of urbanization. The objective of this division is *a balance in the designation of urban and rural reserves that, in its entirety, best achieves* livable communities, the viability and vitality of the agricultural and forest industries and protection of the important natural landscape features that define the region for its residents. OAR 660-027-0005(2) (emphasis added).

The last sentence of this section – the statement of the objective – has been interpreted by the local governments, the commission, and the Court of Appeals as a standard to be satisfied. It has not, however, been construed as an objective standard with only one “right” answer. Instead, in recognition of the tension between the between livable communities, vitality of farm and forest industries, and protection of natural resource features, the “best achieves” standard allows for a “range of possible outcomes that Metro and the counties can come to.” *Barkers Five* at 317 (quoting then-DLCD Director Whitman’s rule explanation with approval). Because the local governments were faced with myriad complex considerations and decisions in their review and adoption of reserves, consideration of the “best achieves” standard was the final step that allowed the regional leaders to step back to conclude whether the decision – in its entirety – achieved the stated objective.

1. Reason for Remand

In its remand of urban and rural reserves, the Court of Appeals said:

LCDC's order is unlawful in substance to the extent that it approved Washington County's legally impermissible application of the rural reserve factors pertaining to agricultural land. Thus, on remand, LCDC must, in turn, remand Washington County's reserves designation as a whole for reconsideration and remand the submittal to Metro and the counties so that they can ultimately assess whether any new joint designation, in its entirety, satisfies the best achieves standard. *Barkers Five* at 364.

The Oregon Legislature dispensed with issues concerning reserve boundaries in Washington County by enacting the boundaries in HB 4078. The legislation did not, however, expressly address the best achieves standard. Several parties have advanced opposing views on how the commission should proceed on this issue when responding to the remand.

Issues relating to the remand of reconsideration of the best achieves standard are addressed in the following briefs:

- Barkers (response brief at 9)
- Cities (opening brief at 12–13; response brief at 10)
- Clackamas County (opening brief at 16–17)
- Maletis (opening brief at 4–7; response brief at 4–7)
- Metro (opening brief at 18–20; response brief at 6–7)
- Multnomah County (response brief at 9)

The Cities, Clackamas County, and Maletis all contend that the commission is compelled by the court's decision to remand the reserves submittal in order for the regional governments to assess whether any new joint designation, in its entirety, satisfies the best achieves standard. These three parties contend that regardless of the commission's actions regarding rural reserve Area 9D and the Stafford urban reserves, the boundary changes enacted by HB 4078 require such reassessment. Cities opening brief at 12; Clackamas County opening brief at 16; Maletis response brief at 3. This view is perhaps best stated by Clackamas County:

Instead of Washington County and Metro adopting new reserve designations, the legislature did so through HB 4078. Findings should be adopted that either assess whether this new joint designation satisfies the standard, or, explain how the standard operates in light of HB 4078. As it stands, there are no findings and no evidence in the record which address the 'best achieves' standard after the changes to the overall urban reserve acreage resulting from HB 4078. Therefore, remand to Metro and the counties to address the 'best achieves' standard is required, and revised designations may be appropriate or necessary in order to comply with the standard. Clackamas County opening brief at 16.

Maletis takes a stronger stance by arguing that HB 4078 has essentially no effect on this part of the remand:

LCDC must remand the reserves matter because the [c]ourt ordered this relief, and LCDC lacks the authority to disobey the [c]ourt's order. An administrative agency has authority on remand to act in accordance with its powers, unless a court instructs otherwise. Maletis opening brief at 4.

Metro argues that the legislature's actions must be understood in the context of the Court of Appeals' decision and LCDC's rules, and that the legislature intended to override the entirety of the court remand with respect to Washington County, leaving the only possible application of the "best achieves" standard to the circumstance where Multnomah County or Metro reached different conclusions with respect to Area 9D or Stafford.

Even if LCDC remands the decision to Metro and the counties for further proceedings, as long as those proceedings do not result in changes to the reserves maps in Multnomah and Clackamas Counties, there will be no need to reconsider the best achieves standard to account for the HB 4078 revisions.

The Oregon legislature is presumed to be aware of existing law when it enacts new legislation. *Blanchana, LLC v. Bureau of Labor and Industries*, 354 Or 676, 691 (2014); *State v. Stark*, 354 Or 1, 10 (2013). This presumption also applies to administrative rules adopted by LCDC. *Beaver State Sand & Gravel v. Douglas County*, 187 Or App 241,249-50 (2003). When the legislature adopted revisions to the Washington County reserves map as part of HB 4078, it is presumed to have been aware of LCDC's administrative rule requiring that there be a balance in reserve designations that "best achieves" the stated goals. The adoption of HB 4078 created a statutory requirement regarding the location of reserves in Washington County that takes precedence over LCDC's "best achieves" rule and does not require subsequent action by LCDC, Metro and/or the counties to explain why the statute satisfies an administrative rule requirement. Statutes necessarily control over administrative rules. *Avis Rent A Car System, Inc. v. Dept. of Rev.*, 330 Or 35, 41 (2000).

Moreover, the express terms of HB 4078 indicate a legislative intent to preempt existing land use law. Each section of HB 4078 that establishes new locations for reserve areas or the UGB begins with the phrase "*For purposes of land use planning in Oregon*, the Legislative Assembly designates the land in Washington County...." HB 4078, Sec 3(1), (2), (3) (2014). The legislature was aware that its actions in redrawing the UGB and reserve maps preempt other land use planning rules (including for example LCDC's Goal14 rules regarding UGB expansions), and therefore included this language to clearly state that its action in adopting the new maps need not demonstrate compliance with other existing land use statutes, goals or rules. Metro opening brief at 18-19 (emphasis in original).

Maletis, in response, argues:

First, although Metro contends that the Legislature intended to preempt LCDC, Metro, and the Counties from addressing the “best achieves” standard on remand, there is no text, context, or legislative history that supports this contention. For example, HB 4078 does not include any express findings or substantive provisions addressing the “best achieves” standard by citation or by reference to its operative terms. Further, HB 4078 does not include any express or implied preemption on this issue. Maletis response brief at 3.

With respect to the argument that the legislature is presumed to be aware of existing law when it enacts new legislation, Maletis argues:

* * * the [c]ourt’s decision in *Barkers Five* was also “existing law” at the time the Legislature considered HB 4078, so the Legislature can be presumed to be aware of it as well. The [c]ourt’s decision expressly directed LCDC to “remand the entire submittal to Metro and the counties so they can ultimately assess whether any new joint designation, in its entirety, satisfies that standard.” By not addressing the “best achieves” standard in HB 4078, the Legislature could have signaled, not that it was applying or overriding this standard, but that it was not disturbing the [c]ourt’s direction that Metro and the Counties address this issue. Thus, because there is ‘existing law’ on both sides of the issue, it is unreasonable to conclude that [the court] intended to apply or override the “best achieves” standard by adopting HB 4078. LCDC should deny Metro’s contention that *Blachana, LLC* supports its position.” Maletis response brief at 5 (internal citations omitted).

The department has not been able to review the legislative history for HB 4078. However, Barkers did include a set of amendments ([HB 4078-12](#), February 25, 2014), which appear to address the “best achieves” standard:

- (20) The regional and local land use decisions related to Multnomah County and Clackamas County that were approved by the Land Conservation and Development Commission in Approval Order No. 12-UGB-001826 and are validated by sections 3 and 4 of this 2014 Act achieve a balance in the expansion of the area within the urban growth boundary and in the designation of urban reserves and rural reserves that best achieves:
 - (a) Livability in our communities;
 - (b) Viability and vitality in our agricultural and forest industries; and
 - (c) Protection of the important natural landscape features that define the metropolitan region for its residents.

This section does not appear in the adopted version of the bill. E-mails attached to the Barkers response brief suggest that some of the interests involved in negotiating HB 4078 did not like the language, and therefore it was deleted from the bill draft that moved forward. *See* Barkers response brief at Exhibit 5, p. 44 (e-mail from Representative Brian Clem dated February 26, 2014). Evaluating the “dash-12” amendments, the department notes that the pertinent language offered in these amendments would have addressed the “best achieves” standard for the entire reserves decision (and *irrespective* of any future decisions on Area 9D or Stafford), not just the Washington County portion.

2. Department Analysis

As discussed above, the Court of Appeals’ decision remanded all of the urban and rural reserves designations for Washington County. As part of that wholesale remand, the court directed the commission to remand the entire submittal so that Metro and the counties could assess whether “any new joint designation, in its entirety, satisfies the best achieves standard.” *Barkers Five* at 364.

Without the intervention of the legislature in HB 4078, the commission’s deliberations on remand would be clear: the entire submittal would be required to be remanded to Metro and the three counties so that Washington County could re-evaluate rural reserves designations, after which all four local governments would again assess whether the final result “best achieved” the balance of livable communities, vitality for the farm and forest industries, and protection of natural features. That not being the case, the commission must determine what the *Barkers Five* decision and HB 4078, taken together, require with respect to the “best achieves” standard.

As Metro notes in its brief, the Oregon Legislature is presumed to be aware of existing law when it enacts new legislation. *Blanchana, LLC v. Bureau of Labor and Industries*, 354 Or 676, 691 (2014); *State v. Stark*, 354 Or 1, 10 (2013). The scope of “existing law” of which the legislature is presumed to be knowledgeable includes administrative rules adopted by this commission. *Beaver State Sand & Gravel v. Douglas County*, 187 Or App 241, 249-50 (2003) (“given LCDC’s integral role in the land use process, the Supreme Court has recognized that LCDC’s rules serve as context for later legislative amendments”). It also includes judicial decisions. *State v. Clevenger*, 297 Or 234, 244 (1984); *State v. Trenary*, 114 Or App 608, 615 (1992).

Based on the above guidance, the legislature is deemed to be aware of both the administrative rule requirement for the local governments to satisfy the “best achieves” standard, and the Court of Appeals’ interpretation that the standard allows for a “range of possible outcomes.” Likewise, the legislature is presumed to know that the Court of Appeals remanded the reserves decision because of Washington County’s misapplication of the reserves factors was pervasive enough such that a different outcome of reserves designations was possible. This in turn triggered the need to remand the entire submittal to Metro and the counties so that they could re-evaluate whether the new Washington County designations, together with the Metro and Clackamas and Multnomah County designations, “best achieved” the objectives of the rural and urban reserves scheme.

The question before the commission is whether the legislature only addressed the first part – the designations of urban and rural reserves – without addressing the second part – whether the new designations require a reassessment of the “best achieves” standard. Unfortunately, the legislative intent is not explicit.

The department believes that the legislative intent can be interpreted as suggested by Metro. As an initial matter, the legislature’s intent was to address the portion of the court’s decision which would have resulted in a wholesale remand to Washington County is explicit in HB 4078. For example, the staff summaries for the adopted “dash-18” amendments describe the effect of the amendment: “Designates land in Washington County designated as rural and urban reserve in Metro Resolution No. 11-4245, adopted March 15, 2011, as acknowledged rural and urban reserve except for certain areas specified in measure.” [Staff Summary for the House Committee on Rules, dated February 25 and 27, 2014](#); see also [Staff Summary for the Senate Committee on Rules, dated March 3, 2014](#).

Further, the plain text of the rule describes the new designations as the “*acknowledged*” rural and urban reserves. Section 3 of HB 4078 provides in relevant part:

Section 3. (1) For *purposes of land use planning* in Oregon, the Legislative Assembly designates the land in Washington County that was designated as rural reserve in Metro Resolution No. 11-4245, adopted on March 15, 2011, as the *acknowledged* rural reserve in Washington County, except that:

* * *

(2) For *purposes of land use planning* in Oregon, the Legislative Assembly designates the land in Washington County that was designated as urban reserve in Metro Resolution No. 11-4245, adopted on March 15, 2011, as the *acknowledged* urban reserve in Washington County, except that:

* * *

(3) For *purposes of land use planning* in Oregon, the Legislative Assembly designates the land in Washington County that was not reserved by designation in Metro Resolution No. 11-4245, adopted on March 15, 2011, the Legislative Assembly designates”

- (a) As *acknowledged* rural reserve the real property * * *
- (b) As *acknowledged* rural reserve the real property * * *
- (c) As *acknowledged* rural reserve the real property * * *
- (d) As *acknowledged* rural reserve the real property * * *.

(Emphasis added.)

The term “acknowledged” has a special meaning in land use. The term is defined at ORS 197.015(1):

“Acknowledgement” means a commission order that certifies that a comprehensive plan and land use regulations, land use regulation or plan or regulation amendment complies with the goals or certifies that Metro land use planning goals and objectives, regional framework plan, amendment to Metro planning goals and objectives or amendments to the regional framework plan comply with the goals.

Thus, one interpretation of the legislature’s use of the term “acknowledged” is that the legislative designations for Washington County are insulated from further review for compliance with the goals and implementing administrative rules. Such interpretation is consistent with the view that the legislature intended to fully resolve the reserves issues remanded by the court of appeals – including the “best achieves” standard.

Finally, as Metro notes in its brief, the legislature’s use of the phrase “For purposes of land use planning in Oregon, the Legislative Assembly designates the land in Washington County * * *” supports an interpretation that the legislature was aware that its actions redrawing the reserves boundaries and UGB preempted other land use planning rules (*e.g.*, Goal 14 and its implementing rules). *See* Metro opening brief at 19-20. This interpretation is also bolstered by Section 9 of HB 4078, which gave the commission authority to approve the submittal even if the findings do not recite adequate facts or conclusions of law, or adequately identify the legal standards or the relationship of the legal standards to facts. Presumably the legislature would not have granted this one-time authority if the commission did not otherwise have the ability to resolve the court of appeals remand without a subsequent remand to Metro and Multnomah County. ORS 197.010 (where there are several provisions or particulars, the provisions should be construed, if possible, to give effect to all).

The primary difficulty with the above interpretation is that it upends what the local governments, the commission, and the Court of Appeals understood to be the construct for the application of the “best achieves” standard: a final step to be undertaken jointly by Metro and the three counties to evaluate whether the decision – in its entirety and not as component pieces – achieved the objective. Such a reading would – in the view of several parties – amount to the commission inserting what has been omitted, contrary to the general rules of statutory construction. *See* ORS 174.010.

3. Staff Recommendation

As described above, the parties have expressed two plausible, but conflicting, interpretations of the legislature’s intent in HB 4078: (1) that the legislature did not address the impact of the changes it made for reserves in Washington County, thus requiring Metro and the three counties to adopt a new assessment for the “best achieves” standard; or (2) the legislature preempted the portion of the analysis relating to Washington County, requiring such an assessment only if there was a change in the reserves maps in Clackamas and Multnomah counties. The department has

evaluated these arguments, but has not been able to undertake additional research concerning legislative history, which might help to resolve the disagreement.

In the absence of requesting additional briefing on the legislative history, the department offers the following options.

1. If the commission declines to re-affirm the rural reserve designation for Area 9D and the urban reserves designation for Stafford, the commission should pass along the court's instruction to consider the impact of any adjustments made by the local governments on remand to the "best achieves" standard. If the commission also determines that the legislature did not intend to preempt an evaluation of the reserves changes made by HB 4078, the commission should direct the local governments to re-evaluate the "best achieves" standard to the entirety of the post-HB 4078 reserve designations.⁵
2. If, on the other hand, the commission decides to re-affirm the rural reserve designation for Area 9D and the urban reserves designation for Stafford, the commission must also decide how to interpret the legislative intent with respect to the "best achieves" standard. If the commission determines that the legislature did not intend to preempt an evaluation of how the HB 4078 reserve changes affected the "best achieves" standard, the commission must determine the effect of that change, and, most likely, remand the decision for Metro and the three counties to adopt a new assessment. In the alternative, if the commission determines that the legislature intended to preempt any further application of the best achieves standard to Washington County, the commission may reject the contrary arguments and re-affirm the decision.

E. Amount of Land

OAR 660-027-0040(2), which implements ORS 195.145(4), provides:

Urban reserves designated under this division shall be planned to accommodate estimated urban population and employment growth in the Metro area for at least 20 years, and not more than 30 years, beyond the 20-year period for which Metro has demonstrated a buildable land supply inside the UGB in the most recent inventory, determination and analysis performed under ORS 197.296. Metro shall specify the particular number of years for which the urban reserves are intended to provide a supply of land, based on the estimated land supply necessary for urban population and employment growth in the Metro area for that number of years. The 20 to 30-year supply of land specified in this rule shall consist of the combined total supply provided by all lands designated for urban reserves in all counties that have executed an intergovernmental agreement with Metro in accordance with OAR 660-027-0030.

⁵ As discussed earlier, there is a range of possible outcomes that Metro and the counties can come to applying the "best achieves" standard. Thus, it is possible – even likely – that the local governments could still find that the adjusted reserves designations "best achieve" the objectives and purposes of the urban and rural reserves provisions.

The Court of Appeals considered several assignments of error alleging the original urban and rural reserves submittal violated this “amount of land standard.” The court ruled against all of the appellants and found that the commission’s approval of the submittal was consistent with this standard. Thus, the court’s decision does not require that the commission address the “amount of land standard” on remand.

The court’s decision came before HB 4078, however. The bill changed the amount of urban and rural reserve land in Washington County. Clackamas County contends that this standard is relevant to the commission in its response to the remand.

Perhaps an unintended consequence of the Grand Bargain bill (HB 4078), which effectively redesignated a number of acres in Washington County, was that it affected the overall amount of land designated as urban reserves in Metro area which, in turn, affected the “amount of land” standard. By removing net acreage of urban reserves from Washington County, the overall amount of land which was designated as urban reserves in the Metro area was decreased. Clackamas County opening brief at 15.

Clackamas County continues, arguing that new findings must be adopted – by the local governments – to address this standard:

It may be the case that enough land remains in urban reserves to satisfy the “amount of land” standard, or perhaps the “amount of land” standard is insulated from further review given the legislative action that was taken to redesignate the urban reserves in Washington County. Alternatively, Metro and the counties could find that additional acres of urban reserves need to be adopted to make up the deficiency. Clackamas County opening brief at 15; *see also* Barkers Five opening brief at 17-18.

Metro argues that the legislative enactment does not need commission action.

In the absence of a specific directive by the court to address this administrative rule on remand, there is no legal basis on which Clackamas County may claim that a full remand to Metro and the counties is required to address the [“amount of land”] standard. If the court intended to require re-application of the standard on remand, it would have said so.

* * * In enacting HB 4078 the legislature enacted a new statutory map of the locations of the UGB and urban and rural reserves in Washington County. This legislative action negated the court's directive requiring remand to Metro and Washington County for reconsideration of the reserve designations, and also negated any need to reconsider or apply the "best achieves" or “amount of land” standards, which are administrative rule requirements that are necessarily preempted by the new statutory map. Statutes necessarily control over

administrative rules. *Avis Rent A Car System, Inc. v. Dept. of Rev.*, 330 Or 35,41 (2000). If LCDC retains jurisdiction over the court's remand and there are no changes in the reserve designations for Stafford and Multnomah County, there is no need for LCDC to reconsider the amount of land standard to account for the legislative changes made by HB 4078 in Washington County. Metro response brief at 6.

1. Department Analysis

As discussed above, the Court of Appeals' decision did *not* remand the Order 12-ACK-001819 to address the "amount of land" standard. The question for the commission is therefore whether the legislative adjustments in HB 4078 effectively re-open the question of whether Metro designated an amount of urban reserves sufficient to accommodate the estimated urban population and employment growth. *See* OAR 660-027-0040(2).

As with the "best achieves" standard, the task for the commission is to determine the intent of the legislature: did the legislature intend to open the question as to whether the post-HB 4078 reserves contained a sufficient "amount of land" for future urban growth. Likewise, the guidance for the commission's statutory interpretation is the same; the legislature is presumed to be aware of existing law, including statutes, administrative rules, and judicial decisions. Thus, as applied here, the legislature is presumed to be knowledgeable about the "amount of land" standard, and the fact that the court of appeals did not remand on that issue.

While there are some differences (*i.e.*, the "amount of land" standard is more quantitative in nature and that this was not at issue in the court's remand), the statutory analysis is essentially the same as for the "best achieves" standard. The options for determining the legislature's intent also follow along the same lines. First, by the text of the bill (*e.g.*, use of the phrase "for purposes of land use planning" and the description of the reserves as "acknowledged"), the legislature intended to settle the reserves designations in Washington County and intended to preempt any further consideration of the adjustments. Second, as with the "best achieves" standard, there is additional contextual support in the bill. *See, e.g.*, Section 9 of HB 4078. Finally, general rules of statutory construction caution against inserting what has been omitted. ORS 174.010. Applying that admonition here, there is no express direction to the commission to consider the effect of the legislative reduction of urban reserves in Washington County.

Clackamas County, Maletis, and Barkers make the other argument: that the changed circumstances brought about by HB 4078 require at least new findings, and a reevaluation of the "amount of land" standard.

2. Staff Recommendation

As described above, the parties have expressed two plausible, but conflicting, interpretations of the legislature's intent in HB 4078: (1) that the legislative changes to urban reserves designations require at least a reevaluation of the "amount of land" standard; and (2) that the legislative action preempts any further evaluation of the effect of the post-HB 4078 reserves designations. None of

the parties have offered any legislative history; as of the time of this staff report, the department has not undertaken additional research.

The task of the commission is to determine the legislative intent. If the commission agrees with Metro's interpretation, the commission can re-affirm its prior decision without remand. If, on the other hand, the commission determines that the legislature did not intend to preempt further evaluation of the effect of the changes made in HB 4078, the commission should remand the submittal for further evaluation and findings. As described by Clackamas County, such remand could conclude that enough land remains in urban reserves to satisfy the "amount of land" standard, or that the "amount of land" standard is insulated from further review given the legislative action, or that additional acres of urban reserves need to be adopted to make up the deficiency.

V. DEPARTMENT RECOMMENDATION

A. Recommendation

The department recommends that the commission accept oral argument at its November 13, 2014 meeting, deliberate on the merits of the various arguments, and provide direction to the department on how to move forward.

The review of urban and rural reserves decision is completed according to the procedures in OAR chapter 660, division 25, "in the manner provided for periodic review." OAR 660-025-0160(7) provides:

Following its hearing, the commission must issue an order that does one or more of the following:

- (a) Approves the [submittal] or a portion of the [submittal];
- (b) Remands the [submittal] to the local government, including a date for resubmittal;
[or]
- (c) Requires specific plan or land use regulation revisions to be completed by a specific date. Where specific revisions are required, the order shall specify that no further review is necessary. These changes are final when adopted by the local government.

* * *

Because the department is not recommending the commission make a final decision at this meeting, proposed motions are not provided. If the commission chooses to employ one of the above decision options at its November 13, 2014 meeting, the department and commission will develop a motion to effect that decision.